Shaw's Supermarkets *and* United Food and Commercial Workers Union Local 791, AFL–CIO. Case 1–RM–1267

December 8, 2004

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On May 14, 2004, the Acting Regional Director for Region 1 administratively dismissed the Employer-Petitioner's petition without a hearing, finding that the Union's demand for recognition based on an alleged contractual "after-acquired" clause does not entitle the Employer to demand an election under Section 9(c)(1)(B). Thereafter, in accordance with Section 102.71(b) of the National Labor Relations Board's Rules and Regulations, the Employer-Petitioner filed a timely request for review. The Union filed an opposition. Having carefully considered the issues in this case, we find that the Employer's request for review raises substantial issues warranting review of the Acting Regional Director's dismissal of the petition, and we remand this case for a hearing.

The Acting Regional Director dismissed the petition because the Union invoked an after-acquired store clause in the parties' collective-bargaining agreement. The clause would assertedly cover a new store in Mansfield, Massachusetts. That store is the subject of the Employer's petition. In the letter administratively dismissing the petition without a hearing, the Acting Regional Director found that the Employer has waived its right to demand an election. Relying on *Central Parking System*, 335 NLRB 390 (2001), the Regional Director concluded that the Union's demand for recognition for the Mansfield store does not entitle the Employer to demand an election under Section 9(c)(1)(B).

The issues in this case include:

> (1) Whether the Employer clearly and unmistakably waived the right to a Board election; (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election.

We do not resolve these issues at this stage. We merely hold that they are worthy of review. Thus, the difference between our dissenting colleague and ourselves is that we would consider these important issues, and our colleague would not.

As to the first issue, the clause provides that the Employer will recognize the Union and apply the contract when a majority of employees have authorized the Union to represent them. The clause does not cover such matters as what the appropriate unit is or who the eligible employees are. For example, is it a wall-to-wall unit? What departments, if any, are excluded? By contrast, the clauses in *Kroger Co.*, 219 NLRB 388 (1975), were different. One of the clauses was expressly confined to the "meat department" employees, and the other clause expressly excluded the meat department. Thus, there could be no question as to the coverage of the clause. The fact that the court and Board construed the language in *Kroger* as clear does not mean that *all* such clauses are clear. Agreements between parties are fact specific, and the mere fact that a clause in a given case is deemed to be clear and unequivocal does not mean that a clause (even a similarly worded clause) in another case is clear and unequivocal. By granting review and a hearing, we simply wish to take evidence concerning the meaning of the instant clause.[1]

Further, it is not clear that the Employer waived its right to a Board election. The clause says that the Employer will recognize the Union if the Union has majority status. The clause does not expressly say that majority status can be shown by cards. However, even if majority status can be shown by cards, the clause does not say that cards are the *exclusive* way to show majority status. That is, the clause does not expressly foreclose the Employer (or the Union) from using Board processes to resolve the issue of majority status. We should be cautious about inferring a waiver of access to Board processes. For example, if a clause says that an employee will use the grievance-arbitration process to resolve issues concerning the propriety of a discharge, that would not necessarily mean that the employee has waived his right to file a Board charge concerning the discharge. Similarly, even if the Employer agreed to recognize the Union upon a showing of card-majority, that would not necessarily mean that the Employer has waived its right to come to the Board.[2]

[1] It may well be that the unit is the same unit as exists in extant stores. And, it may well be that each store is a carbon copy of the other, so that an appropriate unit in one store is an appropriate unit in another. However, absent a hearing, we cannot know these facts. And, as discussed below, these unit and eligibility matters are for the Board to determine.

By citing issues of unit and eligibility we do not intend to foreclose other issues from being raised in the hearing.

[2] Our colleague faults us for remanding this case for hearing to examine the clause and determine whether the Employer expressly waived access to the Board's process. He contends that by considering the possibility of a waiver, we take the position the Board majority took in *Kroger Co.*, 208 NLRB 928 (1974), which was rejected by the D.C.

As to the second issue, it is clear that representation case issues (e.g. appropriateness of unit, eligibility to vote) are for the Board to decide.[3] Similarly, issues concerning whether a card was coercively obtained are for the Board to decide.[4] If we were to dismiss the petition, these issues would be left to the grievance arbitration process that the Union has invoked. In our view, there is at least a reasonable argument that the Board should not defer these issues to the grievance arbitration process.

We recognize that, in *Central Parking*, the Board dismissed the RM petition, and left these issues to the grievance arbitration process. However, as the dissent there points out, this result was contrary to the general rule that the Board does not defer representation case issues to arbitration. By granting review here, we keep open the possibility that the Board will abide by the general rule rather than *Central Parking*.

Our colleague's position regarding *Verizon Information Systems*, 335 NLRB 558 (2001), suggests that the agreement here, unlike other bilateral agreements, is not a two-way street. In *Verizon*, the union agreed to a card-check arrangement, and then turned around and filed an RC petition. Our colleague would have processed that petition. For him, *the employer* waived its right to an election, but *the union* did not. For us, there is at least a question of contract interpretation, as to this matter. In addition, there is a serious question of mutuality and consideration, essential elements of a contract.[5]

With further respect to the second issue, we have some policy concerns as to whether an employer can waive the employees' fundamental right to vote in a Board election. It is clear that the Board's election machinery is the preferred way to resolve the question of whether employees desire union representation.[6] That method, as compared to a card-check, offers a secret ballot choice under the watchful supervision of a Board agent. We recognize that, under current law, an employer can voluntarily recognize a union based on a card-majority, and that such recognition can operate to preclude employee resort to election machinery for a reasonable period of time. However, in *Dana Corporation* and *Metaldyne Corporation*,[7] we have granted review to consider inter alia, that issue. We can do no less here.

Accordingly, the Employer's request for review of the Acting Regional Director's administrative dismissal is granted, the dismissal is reversed, and the petition is reinstated and remanded to the Regional Director to conduct a hearing consistent with this decision.

ORDER

The Acting Regional Director's administrative dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. December 8, 2004

Robert J. Battista, Chairman

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

I dissent from the grant of review. The issue is whether the Union's demand for recognition, which was based on an "after-acquired stores" clause in the collective-bargaining agreement, entitles the Employer to seek an election. As explained below, the Board, at the direction of the D.C. Circuit, has long held that such clauses waive the Employer's right to demand an election. Further, the Board has expressly held that a union's demand for recognition based on such a clause does not support an RM petition. Nevertheless, my colleagues cast doubt on established Board and court precedent by questioning whether the clause in the present case constituted a waiver and whether "policy concerns" outweigh the parties' agreement. The Acting Regional Director correctly dismissed the petition. Review should be denied.

I. BACKGROUND

For many years, the Employer and the Union have been parties to a collective-bargaining agreement covering employees at the Employer's retail food stores.[1]

Circuit. However, in *Kroger*, the Board and court determinations were made after a full hearing. That is what we seek here.

[3] *Hershey Foods*, 208 NLRB 452 (1974); *Commonwealth Gas*, 218 NLRB 857 (1975).

[4] The fact that the General Counsel has administratively dismissed an 8(b)(1)(A) charge that the union used coercion to obtain cards is not binding on the Board as to whether the card is valid.

[5] Our colleague suggests that an employer's agreement to recognize the Union upon a showing of majority status is necessarily an agreement to waive the NLRLB election process. He then goes on to say that, by contrast, a union can offer different consideration in order to obtain recognition. In response, our point simply is that, in both cases, there is a need for a hearing to determine what the parties have agreed to and what, if any, consideration was exchanged.

[6] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[7] 341 NLRB No. 150 (2004).

[1] The parties' submissions to the Board do not include the contract's exact unit description. The Union stated in its brief, and the Employer has not disputed, that the bargaining unit is a geographically defined unit of all store employees excluding management.

Since 1989, the agreement has included the following provision:

> 8. NEW STORES
>
> When the Employer opens new stores within the geographic area described in Article 1, the Employer will allow access within the store prior to opening during the hiring process, will remain neutral, and *will recognize the Union and apply the contract when a majority of Employees have authorized the Union to represent them* (emphasis supplied).

Since 1989, pursuant to the new stores provision, the Employer has recognized the Union as the exclusive bargaining representative of employees in 16 new stores and applied the contract to those employees.

In August 2003, the Employer opened a new store in Mansfield, Massachusetts, within the geographic area covered by the new stores provision. On August 13, the Union notified the Employer that it had obtained authorization cards from a majority of the Mansfield employees. The Union submitted the authorization cards to the Employer, requested recognition, and asked that the collective-bargaining agreement be applied to the Mansfield store employees. The Employer denied recognition.[2]

Pursuant to the contract's grievance and arbitration procedure, the Union filed a grievance over the Employer's refusal to recognize the Union and apply the contract to the Mansfield store.[3] The grievance was scheduled for arbitration. Twelve days before the hearing date, the Employer filed the RM petition at issue here, seeking an election in the Mansfield store.

The Acting Regional Director dismissed the petition, finding that the Union had invoked the agreement's after-acquired stores clause, thereby asserting that the Employer had waived its right to an election. The Acting Regional Director held that a demand for recognition based on an after-acquired stores clause does not entitle the Employer to demand an election.

The Employer requests review. The Employer asks that the Board void the new stores provision, find that the provision does not constitute a waiver of the Employer's right to seek an election, or remand to the Regional Director for a hearing.

[2] The Employer also filed a charge alleging that the cards had been obtained by coercion or misrepresentation in violation of Sec. 8(b)(1) and (2). The Region investigated the charge and dismissed it for lack of evidence, and the General Counsel denied an appeal.

[3] The Union also alleged in its grievance that the Employer had failed to remain neutral and failed to give the Union access to the store as required by the new stores clause.

The Acting Regional Director properly dismissed the petition pursuant to well-settled law. No hearing is necessary. Review should be denied.

II. ESTABLISHED BOARD AND COURT PRECEDENT REQUIRE DISMISSAL OF THE PETITION

The Board will grant requests for review only when "compelling reasons" exist. NLRB Rules and Regulations Section 102.67(c). The Employer has offered no compelling reasons to reconsider the Regional Director's dismissal of the petition. The Acting Regional Director correctly applied Board and court precedent to find that the Union's demand for application of the new stores clause does not entitle the Employer to an election.

A. Relevant Legal Principles

"The [National Labor Relations Act] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401 (1952). Consistent with this fundamental purpose, it is beyond dispute that a union need not be certified as the winner of a Board election in order to become the exclusive bargaining representative. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596–597 (1969). Instead, an employer may agree to recognize a union that has demonstrated majority support by other means, including signed authorization cards.[4] When an employer agrees to recognize a union voluntarily on the basis of a showing of majority support, the employer will be held to that agreement. See, e.g., *Snow & Sons*, 134 NLRB 709, 710 (1961) (employer bound by its agreement to honor the results of a card check), enfd. 308 F.2d 687 (9th Cir. 1962); cf. *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (enforcing card-check and neutrality agreement pursuant to Section 301 of Labor-Management Relations Act); *Hotel & Restaurant Employees Union Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992) (same).

Furthermore, once an employer and a union have negotiated a collective-bargaining agreement, maintaining the integrity of that agreement is "a most basic policy of the national labor law." *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802, 807 fn. 20 (D.C. Cir. 1975).

[4] The Board and courts have uniformly endorsed voluntary recognition. See, e.g., *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *Terracon, Inc.*, 339 NLRB No. 35, slip op. at 5 (2003), affd. 361 F.3d 395 (7th Cir. 2004); *MGM Grand*, 329 NLRB 464, 466 (1999).

In keeping with these principles, the Board has long recognized that parties may agree by contract that the employer will voluntarily recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in stores acquired after the execution of the contract. The Board refers to such clauses as "after-acquired stores" or "additional stores" clauses.

The leading case in this area is *Kroger Co.*, 219 NLRB 388 (1975). In *Kroger*, the employer was party to collective-bargaining agreements with two unions, the Retail Clerks and the Meat Cutters. The agreements provided that each union would be the exclusive bargaining representative of employees in designated classifications at all stores operated by the employer's Houston Division in Texas.[5] After the employer transferred two stores from its Dallas to its Houston Division, the unions obtained authorization cards from a majority of the employees in those two stores. The unions then requested recognition pursuant to the contract clauses described above. The employer refused. The unions filed a charge and the General Counsel issued a complaint alleging that the employer violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the unions.

The Board dismissed the complaint. See 208 NLRB 928 (1974). The Board found that the additional stores clause did not waive the employer's right to seek an election. The Board acknowledged that an employer may voluntarily recognize a union that has majority support, but noted that the contract clause did not make any reference to majority support.

The court reversed and remanded. See *Retail Clerks Int'l Ass'n, Local 455 v. NLRB*, 510 F.2d 802 (D.C. Cir. 1975). The court noted that "the Board's interpretation process in this case shows insufficient regard for the integrity of collective bargaining agreements, a most basic policy of the national labor law." Id. at 807 fn. 20. The court held unequivocally that the additional stores clause meant that the employer had waived its right to a Board ordered election:

> [T]he "additional store clause" can have no purpose other than to waive the employer's right to a Board ordered election. If the clause is "interpreted" to permit the employer to petition for a Board election, then the clause means nothing to the union. The union and the employer have under the NLRB a right to seek an election. They do not need a contract clause to grant them that right. . . . We conclude that the "additional store clauses" involved here can only be interpreted to mean that the employer waives its right to a Board ordered election.

Id. at 805–806.

On remand, the Board adopted as "the only reasonable interpretation" the court's view that the contract clauses were waivers of the employer's right to demand an election. *Kroger*, 219 NLRB at 389. The Board held that "there is no need to hold these clauses totally invalid simply because they do not contain an explicit condition that unions must represent a majority of the employees in a new store, inasmuch as the Board will impose such a condition as a matter of law." Id. Finally, the Board reasoned that "national labor policy favors enforcing [the clauses'] validity." Id. The Board explained:

> As we have interpreted them, these clauses are contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Unions' representation status in these new stores. To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements.

Id. Consequently, the Board found that the employer had violated Section 8(a)(5) and (1) by refusing to recognize the unions. See id.

For nearly 30 years, the Board has repeatedly followed *Kroger* and found that an employer waives its right to an election by agreeing to an additional stores clause. See, e.g., *Raley's*, 336 NLRB 374, 378 (2001); *Alpha Beta Co.*, 294 NLRB 228, 229 (1989); *Jerry's United Super*, 289 NLRB 125, 138–139 (1988).[6] The fact that such a clause does not explicitly state that it constitutes a waiver

[5] The Retail Clerks' agreement provided:

> The Union shall be the sole and exclusive bargaining agent for all employees employed by the Houston Division of Kroger Food Stores in stores operating in the State of Texas, excluding all persons employed in the meat departments. . . .

The Meat Cutters' agreement provided:

> A. The Employer recognizes Meat Cutters Local No. 408 as the exclusive and collective-bargaining agent for all employees in the meat department in all of Employer's retail stores located in the state of Texas operated by the Houston Division of the Kroger Co.
>
> B. The parties agree that this contract shall cover and the Union which is a party hereto shall have jurisdiction over all meat department employees in retail stores that are, or will be, owned, leased, or operated by the Employer.

Kroger Co., 208 NLRB 928 (1974).

[6] See also *Marriott Corp.*, supra at 1468 (citing *Kroger* for the principle that "national labor policy favors enforcing contract clauses waiving employer's right to demand an election"); *Road Sprinkler Fitters Local Union No. 669 (A-1 Fire Protection, Inc.) v. NLRB*, 600 F.2d 918 (D.C. Cir. 1979) (citing *Retail Clerks*' waiver finding with approval).

is not determinative. See *Alpha Beta*, supra at 229. The Board has held that the only reasonable interpretation of such clauses is as a waiver of the employer's right to a Board-ordered election. See id.

The Board has also applied *Kroger* to the very situation present here: an RM petition filed in response to a union's invocation of an after-acquired stores clause. See *Central Parking System*, 335 NLRB 390 (2001). In *Central Parking*, the union contended that its agreement with the employer contained an "after-acquired stores clause," pursuant to which the employer agreed, upon proof of majority status, to recognize the union as the bargaining representative of employees at after-acquired parking facilities in the San Francisco area. When the employer acquired another company that operated parking facilities in that area, the union sought recognition as the collective-bargaining representative of employees at those facilities. The employer denied recognition, and the union filed a grievance and sought arbitration. The employer refused to arbitrate and instead filed an RM petition for an election in a separate unit consisting of the newly acquired facilities. The Regional Director dismissed the petition, and the Board majority affirmed. The Board stated:

> In essence, the assertion of an after-acquired clause is a claim that the Employer has waived its right to demand an election. . . . Accordingly, the Union's demand for recognition based on an alleged contractual "after-acquired" clause does not entitle the Employer to demand an election under Section 9(c)(1)(B).

Id. at 390.[7] *Central Parking* therefore makes clear that under *Kroger*, an RM petition that is based on a demand to apply an after-acquired stores clause must be dismissed.

B. Kroger and Central Parking Require Dismissal of the Petition

The Acting Regional Director correctly dismissed the Employer's petition pursuant to the Board and court precedent discussed above. The collective-bargaining agreement in the present case contains a "new stores" provision that requires the Employer to recognize the Union at the Employer's new stores upon proof of majority support. The Employer's petition is based on the Union's request to apply this clause to the Mansfield store. Pursuant to the clear principles of *Kroger* and *Central Parking*, therefore, the Acting Regional Director properly dismissed the petition.

The Employer argues that *Kroger* is distinguishable, because the after-acquired stores clauses in *Kroger* would have been illusory or meaningless unless interpreted as waiving the employer's right to an election. According to the Employer, the clause in the present case is fundamentally different, because it provides the Union with other "substantial benefits" such as employer neutrality and access to the Employer's premises. Therefore, the Employer argues, the new stores clause here would not be illusory or meaningless if interpreted to be something other than a waiver of the right to seek an election. Although the clause states that the Employer *will recognize* the Union and apply the contract to the new stores upon proof of majority status, the Employer characterizes this language as merely "allowing" the Union to seek, and the Employer to grant, voluntary recognition. This characterization is unsupportable for two reasons. First, it is contrary to the plain language of the clause, which provides that the Employer "will"—not "may"—recognize the Union upon a showing of majority support. Second, the Employer's characterization makes the recognition portion of the new stores clause meaningless, just as in *Kroger*. The parties need no contract clause to "allow" the Union to seek and the Employer to grant voluntary recognition. Accordingly, the Employer's attempt to distinguish *Kroger* on this basis has no merit.

My colleagues and the Employer characterize the Acting Regional Director's dismissal of the petition as the deferral of representation case issues to the grievance and arbitration process. They question whether such deferral is appropriate. The Employer notes that the Board only infrequently defers to arbitration in representation proceedings, and will find deferral appropriate when the issues turn solely on contract interpretation, but not when they turn on statutory policy. See, e.g., *St. Mary's Medical Center*, 322 NLRB 954 (1997). The Employer cites decisions in which the Board has declined to defer issues of accretion to arbitration. Those cases did not involve after-acquired stores clauses. As the Board stated in *Central Parking*:

> [I]t is well established that accretion is a matter involving the application of statutory policy and standards—a matter within the particular province of the Board. By contrast, an issue of contractual interpretation arising from the assertion of an after-acquired clause—the issue presented in this case—is, as noted below, a matter that is properly resolved through the grievance-arbitration procedure.

[7] The Board also noted that the union sought to represent the employees as part of the existing unit, not in the separate unit for which the employer sought an election. Because there was no demand for recognition in the petitioned-for unit, there was no question concerning representation. Id. at 390–391.

335 NLRB at 391 fn. 3. The issue in the present case turns on contract interpretation: whether the Employer breached its collective-bargaining agreement by refusing to apply the new stores clause to the Mansfield store.[8]

C. The Argument That the New Stores Provision Is Not a "Clear and Unmistakable" Waiver Must Fail

My colleagues and the Employer find it questionable whether the new stores clause was a "clear and unmistakable" waiver of the right to a Board election. As the Board and D.C. Circuit have clearly stated, that is exactly what an after-acquired stores clause is: a clear and unmistakable waiver of the employer's right to seek an election. See *Retail Clerks*, supra at 806 fn. 15 ("the additional store clause was a clear and unmistakable waiver of the employers' right to a Board conducted election"); *A-1 Fire Protection, Inc.*, 250 NLRB 217, 220 (1980), remanded on other grounds 676 F.2d 826 (D.C. Cir. 1982) (citing *Kroger* as an example of an application of the "clear and unmistakable" waiver standard). My colleagues and the Employer offer several reasons why, despite *Kroger*, the new stores clause should not be considered a clear and unmistakable waiver. All are meritless.

1. The new stores provision adequately protects Section 7 rights

The Employer argues that the new stores provision cannot be considered a waiver because it does not adequately protect employees' Section 7 rights. The Employer notes that the clause does not spell out such things as the procedures for determining majority status or for resolving alleged violations of the Act in connection with the hiring process at the new stores. As the Employer concedes, the after-acquired stores clauses in *Kroger* also did not contain such specifics. If anything, the new stores clause in the present case is more specific than the *Kroger* clauses. For example, the clause in the present case expressly requires proof of majority support before the Employer is obligated to recognize the Union. The clauses in *Kroger* did not explicitly state such a requirement; the Board imposed it as a matter of law. Even the less precise language in *Kroger* was found by the court to have "no other purpose than to waive the employer's right to a Board ordered election." *Retail Clerks*, supra at 805; see also *Raley's*, supra at 378 (reading into the clause a requirement that the union prove majority support before the employer must extend recognition).

Similarly, my colleagues find that a hearing is necessary to determine whether the clause is a waiver, because the clause does not expressly state that majority status can be shown by authorization cards and does not expressly foreclose the Employer from using the Board's processes to resolve the issue of majority status. The Board majority took that position in its initial *Kroger* decision,[9] which the D.C. Circuit reversed. See *Retail Clerks*, supra; see also *Alpha Beta*, supra at 229 (reversing judge and finding that after-acquired stores clause was a waiver of employer's right to an election; judge erred in relying on the fact that "nothing in [the clause] refers to waiver of the right to a Board election or to any alternative means of proving majority"). Thus, my colleagues' position is undercut by Board and court precedent.[10]

2. The Employer's past practice argument lacks merit

The Employer also argues that in the past, the parties have not treated the new stores clause as a waiver of the employer's right to seek an election. The Employer's argument appears to be based on three instances in which the parties filed unfair labor practice charges regarding certain conduct connected to the opening of new stores. However, during the 15 years that the new stores clause has been included in the contract, the clause has been applied to 16 new stores, and the Employer has not sought an election. In one instance, the Employer contended that a store was not a "new store" and therefore was not subject to the clause. The issue was arbitrated and decided in the Union's favor. Thus, even if evidence of past practice were necessary here, the facts would not support the Employer's argument.

3. The Employer misconstrues *Verizon*

The Employer argues that my dissent in *Verizon Information Systems*, 335 NLRB 558 (2001), supports the argument that the "new stores" provision is not a clear and unmistakable waiver of the Employer's right to seek an election. The Employer misconstrues my dissent in *Verizon*. In that case, the employer and the union entered

[8] The Employer also notes that the Acting Regional Director's dismissal does not address the Employer's argument that the Union obtained the authorization cards through coercion and misrepresentation. However, the Employer has already had the opportunity to raise that claim to the Board. The Employer filed a charge alleging that the cards were obtained in violation of Sec. 8(b)(1) and (2). The Regional Director investigated the allegations and declined to issue a complaint. It is well established that the General Counsel's decision not to issue an unfair labor practice complaint is final and unreviewable. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

[9] See *Kroger*, 208 NLRB at 929 fn. 8 ("[T]he contract does not contain any agreement as to how majority status shall be established; in the absence of any such agreement, surely access to NLRB procedures cannot be said to have been consciously waived.").

[10] My colleagues also express "policy concerns" as to whether an employer can waive the right to a Board election. *Kroger* established, and *Central Parking* reaffirmed, that an employer can do so. Unlike my colleagues, I would not cast doubt on longstanding precedent by reconsidering that issue.

into a neutrality and card check agreement. Among other things, the agreement provided (1) that the employer, on request, would provide the union with certain employee information and access to the employer's premises; (2) that the employer and union would attempt to agree on appropriate bargaining units and would submit the issue to arbitration if they were unable to agree; and (3) that the union would be recognized as the exclusive bargaining representative for any agreed-upon or bargained-for unit if the union showed proof of majority status through authorization cards. Pursuant to the agreement, the union requested certain employee information, and the employer provided it. The parties were unable to agree on the scope of the units and, at the union's urging, scheduled an arbitration hearing. Before the hearing, the union decided to seek an election and filed a representation petition. The Board majority dismissed the petition on the basis that the union, having invoked the parties' neutrality and card check agreement and received benefits from it, was estopped from seeking an election. Id. at 560–561.

I dissented, finding that the agreement did not contain a clear and unmistakable waiver of the union's right to seek an election. Id. at 561–562. Board and court precedent clearly establishes that a new stores provision like the one in the present case constitutes a waiver of the employer's right to seek an election. See, e.g., *Kroger*, supra at 389; *Retail Clerks*, supra at 805–806. By agreeing to recognize a union voluntarily, an employer unquestionably relinquishes a right it otherwise would have: the right to seek an election. By contrast, neither the Board nor the courts have established any clear legal principle that an *employer's* promise of voluntary recognition constitutes a waiver by the *union* of the union's right to seek an election. As explained in my dissent, the parties' neutrality and card check agreement in *Verizon* failed to fill this gap. The agreement neither explicitly nor implicitly mentioned any waiver or other limitation on the union's right to file a petition.[11] Therefore, unlike the present case, in *Verizon* there was an insufficient basis on which to find that the union had waived its right to seek an election.[12]

My colleagues suggest that there is "a serious question of mutuality or consideration" if agreements such as the one in *Verizon* are deemed to waive only the employer's right, but not the union's right, to seek an election. My colleagues imply that a waiver by the union of its own right to seek an election is a necessary part of the consideration for the employer's promise to recognize the union upon proof of majority status without an election. That is not the case. A union can offer other valuable consideration in exchange for an employer's promise of voluntary recognition. For example, a union can forgo its right to engage in picketing or other economic action. By contrast, as the Board and courts have held, the only right the Employer gives up by entering into this type of clause is the right to petition for a Board-conducted election. See *Retail Clerks Int'l Association, Local 455 v. NLRB*, supra at 805–806.

Furthermore, my colleagues state that my position regarding *Verizon* suggests that the agreement in the present case is not a "two-way street." However, the new stores clause in the present case was part of a negotiated collective-bargaining agreement. As the Board recognized in *Kroger*, the give and take of collective bargaining involves a party giving up a right in one area in exchange for concessions in another area.[13] It is not necessary to find that the new stores clause waives both parties' rights to seek an election in order to find that the parties' agreement as a whole is a "two-way street."[14]

D. The Employer's 8(a)(2) Argument Lacks Merit

The Employer argues that even if the new stores clause is a waiver, the neutrality, access, and recognition provisions of the clause violate Section 8(a)(2) of the Act, which prohibits employers from giving unlawful assistance or support to a union. The Employer thus places itself in the awkward position of condemning its own conduct as an unfair labor practice in order to avoid its contractual obligation. That issue can be addressed if and when an 8(a)(2) charge is ever filed against the Employer. The Employer does not contend that it has ever been the subject of an 8(a)(2) charge arising out of any of the 16 instances in which it voluntarily recognized the Union pursuant to the new stores provision. In any event, absent other factors, an employer does not violate Section 8(a)(2) simply by agreeing to remain neutral or granting a union access to its premises. Cf. *Hotel & Res-*

[11] Even the majority decision in *Verizon* noted that "[t]he Agreement does not provide that its procedures for voluntary recognition are the only procedures available to the Union." Id. at 560 fn. 8.

[12] In *Verizon*, I found dismissal of the union's petition inappropriate for the additional reason that the Board generally does not defer questions of representation to arbitration where resolution of the issues turns on the application of statutory policy rather than contract interpretation. See 335 NLRB at 562. As I stated in *Verizon*, the unit determination in that case did not turn on contract interpretation because there was no contract. Here, of course, there is a contract, and the issue to be resolved does turn on contract interpretation. See Section C.3, supra.

[13] See 219 NLRB at 389 ("To permit the Employer to claim the very right which it has forgone, *perhaps in return for concessions in other areas*, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements") (emphasis supplied).

[14] Of course, the Union has not sought an election here, so the issue of whether it has waived the right to do so is not even before the Board.

taurant Employees Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992) (employer's agreement to remain neutral did not contravene Federal labor policy; "[n]othing in the relevant statutes or NLRB decisions suggests employers may not agree to remain silent during a union's organizational campaign—something an employer is certainly free to do in the absence of such an agreement"); *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973) ("the use of company time and property does not, per se, establish unlawful employer support and assistance"). Nor, of course, does an employer violate Section 8(a)(2) merely by agreeing to and applying (upon proof of majority status) an additional stores clause. As explained above, the Board has sanctioned such clauses as binding and enforceable.

III. CONCLUSION

The Acting Regional Director correctly held that the Union's demand for recognition based on the new stores provision does not entitle the Employer to an election. Board precedent is clear that additional stores clauses like the one at issue in the present case waive the employer's right to seek an election. "To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements." *Kroger*, supra, 219 NLRB at 389. Review is unnecessary and serves only to cast doubt on the principles that were articulated in *Kroger* and have been followed for nearly 30 years. The Employer's Request for Review should be denied.

Dated, Washington, D.C. December 8, 2004

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Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD